ALLAN BERNARDO CASTILLANO & ORS

v.

SAMUEL MILAN & ANOR

HIGH COURT, BRUNEI DARUSSALAM
RG PENLINGTON C
[SUIT NO: 118-1997]
4 SEPTEMBER 1999

TORT: *Vicarious liability - Road accident - Negligence - Existence of emergency situation - Whether defence of "agony of the moment" available to defendant - Whether emergency one of defendant's own making - Whether defendant negligent and liable*

INSURANCE: *Motor insurance - Claims - Construction of policy - Duty of insurers to satisfy third party claims - Exclusion clause - Scope and effect - Motor accident in course of employment - Whether covered by policy - Whether insurers liable*

The plaintiffs, the employees of the second defendant ('D2'), were driven to their workplace in a van by the first defendant co-employee ('D1'). On approaching RIPAS Hospital, Jalan Sultanah Hassanal Bolkiah, D1 wanted to steer to the inner lane of the highway and gave a signal to that effect. From the side mirror of the van, D1 saw a white car in the inner lane and it was coming very fast. D1 thought the white car would slow down to make way for him, and he therefore steered the van into the inner lane. The white car, however, did not slow down. The result was that D1 lost control of the van and the van rammed against a tree on the left side of the road. The plaintiffs, who had all suffered injuries, sued D1 and D2 for negligence. Before the court, D1 and D2 *inter alia* raised the defence of "agony of the moment"or "inevitable accident". It was not in dispute that at the material time the van was insured against third party risks by a policy of insurance with Borneo Insurance Sdn Bhd ('3rd party'). That being so, apart from the question of D1's negligence, an issue also arose as to whether the 3rd party was liable to indemnify the defendants against the plaintiffs' claim.

Held:

[1] The defence of "agony of the moment" or of "inevitable accident" has not been made out. D1 was under a duty to see that he could safely move over into the inner lane. While it is true that D1 had reacted to an emergency, the emergency being the presence of the white car in the inner lane coupled with D1's attempt to move into that lane, it was

one of his own making. D1 had a choice of making the crossing over or not and he made the wrong one. D1 was negligent and is 100% liable for the damage caused.

[2] It is the clear intention of the motor vehicles insurance (third party risks) Act that employees should be covered by insurance in the event of injury. That may be an injury suffered in the course of the employment in which case the employee is covered by the workers compensation insurance, or the employee was not legally acting in the course of his employment but was doing something in pursuance of his contract of employment in which case he should be covered by the vehicle insurance.

[3] To determine the third party's liability, the court should look at the words of the policy which forms the contract between D2 and the third party. There are in this respect two clauses to consider, notwitstanding their apparent conflict, namely: (i) the clause that exempts from cover a person being carried "in the course of their employment"; and (ii) the clause that states that a person being carried "by reason of his employment" shall be covered. The clauses apart, reliance must also be placed on the words "notwithstanding anything contained herein to the contrary" in the second clause.

[3a] The words "notwithstanding anything contained herein to the contrary" in the second clause aforesaid must be given their ordinary meaning. Giving those words their ordinary meaning, the "passenger liability exclusion clause" of the policy does include passengers being carried by reason of employment, as, clearly, the clause "liability to third parties" which says there is no cover for persons being carried in the course of their employment, being "anything to the contrary", must be ignored. In the circumstances, the plaintiffs, being passengers carried in the van by reason of or in pursuance of a contract of employment, were covered by the second article of the policy. The third party is liable to indemnify D2 against the plaintiffs' claim.

[Judgment for plaintiffs; order accordingly.]

Case(s) referred to:

Brandon v. Shorne & Garnett Co [1924] 1 KB 548 ***(refd)***
Hjh Hasmah & Ors v. Ting Sing Hu HCCS 48 of 1997 ***(refd)***
Izzard v. Universal Iron Co Ltd [1937] AC 773 ***(refd)***
Lita Maddox (Administratix of the Estate of Jaime Tipton Galdoves, (deceased) v. Netherlands Ins Co (Est 1945) Ltd [1965-86] 2 BLR 433 ***(refd)***
St Helens Colliery Co Ltd v. Hewitson [1924] AC 59 ***(refd)***

Weaver v. Tredegar Iron and Coal Co. Ltd [1940] 3 All ER 157 ***(refd)***
Vandyke v. Fender [1970] 2 All ER 335 ***(refd)***

Legislation referred to:
Road Traffic Act 1960 [UK], s. 203(4)

Other source(s) referred to:
Bingham's Motor Claims Cases 9th edn 34
Halsburys Laws of England 4th edn, vol 34 para 51

For the plaintiffs - Vincent Joseph; M/s Sandhu & Co
For the defendants - Siva Sankaran; M/s Ahmad Isa & Partners
For the third party - Lisa Tan (KL Soo & Chong Foo Yeen with her); M/s Choo Chan & Wong

Reported by Nik Aras

JUDGMENT

RG Penlington C:

Background

This is an action for damages following a traffic accident and on what party falls the ultimate liability, if any.

On the 3 May 1996 at about 2.30pm a van BL 8719 carrying the three plaintiffs (P1, P2, P3) who were employees of the second defendant (D2) was being driven by the first defendant (D1) along the Sultan Hassanal Bolkiah highway leading into Bandar Seri Begawan from Berakas. Shortly before the turn-off leading to RIPAS Hospital D1 lost control of the van and it struck a tree on the left-hand side of the road.

The van was extensively damaged on its front-left side and the occupants all suffered varying injuries, some minor but others more serious. In particular, P1.subsequently had one of his kidneys badly damaged and it had to be removed. P3 suffered a compression fracture of the spine but made a good recovery. P2 suffered relatively minor injuries. The van was owned at the relevant time by D2 a well-known Swedish company which manufactures and sells household appliances on a world-wide basis. It was not in dispute that D1 was, at the time of the accident, acting as a servant of D2 in the course of his duties and D2 is therefore liable for damage caused by him if he was negligent in a duty of care owed to the plaintiffs.

It was also not in dispute that at the time of the accident the van was insured against third party risks by a policy of insurance dated 15 June 1995 with Borneo Insurance Sdn. Bhd. ("the 3rd party"). There was originally a ground

of defence by the defendants that P1 was not, at the time of the accident, wearing a seat-belt and that contributed to the severity of his injuries. The evidence called, however, did not support that contention and that ground of defence was abandoned.

What was in dispute before me was whether Dl was negligent in the manner in which he drove the van, it being contended that he acted "in the agony of the moment" and, if he was negligent and the plaintiffs were entitled to damages, whether D2 was insured against that liability by reason of the policy of insurance it had with the 3rd party.

The Evidence

P1 and P2 have now returned to the Philippines and the only witness as to fact called by the plaintiffs was P3. He had affirmed an affidavit on 16 August 1999 and he confirmed that it was true and correct. He was then cross-examined by Mr Siva Sankaran for the defendants and Mr Soo for the 3rd party. He said that while he was free to go out and sell appliances on his own, he and the other plaintiffs were under the supervision of D1 and he was obliged to go with D1 during the course of the working day. D1 always drove the van which went to whatever area D1 chose and they were obliged to go with him in it. On the day of the accident they had a meeting with D1 at D2's office from 9-11am and then all went in the van to Berakas to try to make sales. They then returned intending to go back to the office to make their monthly sales report. They did not have any transport available apart from the van driven by D1.

On the way back from Berakas D1 was driving the van. P1, P2 and P3 were all asleep. P1 was sitting beside Dl while P2 and P3 were in the back. Because he was asleep at the time of the accident P3 could not give any useful evidence as to its cause. All occupants of the van were wearing seat-belts.

The only other witness as to the accident was D1, the driver. He said he had been working for D2 for six years and was the supervisor of all the plaintiffs. They had gone to Berakas and were on their way back to their office in Bandar in the van which he was driving. He was in the outer-lane on the highway travelling between 85 and 100 kph. He wanted to move off the highway into a side-road which was just beyond the fly-over near the turn off to Ripas hospital and signalled that he was moving into the inner-lane. He looked into his side mirror and saw there was a white car already in the inner lane. It was going very fast, about 110 kph but he decided he could still move over into the inner-lane in front of the white car. However he then realised he could not do so. He thought the white car had gone faster rather than to slow down to allow him into the inner lane and he over-steered, going

across the inner-lane, over the gutter and struck a tree on the side of the road. The white car did not stop. He said he in fact went behind the white car.

Dl agreed when cross-examined by Mr Joseph for the plaintiffs that he took a risk in moving over into the inner lane when he saw there was a car there. He could have done so further up the road nearer his turn-off.

The Law

The plaintiffs submit that on the facts clearly established here the doctrine of *res ipsa loquitor* applies. Cars do not go off the road and hit trees unless there is negligence and there is an onus on D1 to show he was not so negligent. He has failed to do and indeed he admits he was at fault for moving into the inner lane when it was not clear. He did not have to do so. It was a miscalculation on his part. The plaintiffs rely on the authorities set out in *Halsburys Laws of England 4th'* edn, vol. 34 para. 51. The defence of "agony of the moment" or of "inevitable accident" is not made out. Reliance is placed on the decision of the learned Chief Justice in *Hjh Hasmah and Ors. v. Ting Sing Hu,* HCCS 48 of 1997. The Chief Justice there said that for that defence to succeed the driver must be confronted with "an emergency through no fault of his own" and that no matter what he did the accident was bound to happen.

D1 says that while the accident could have been avoided by his not moving to his left, he was confronted with an emergency in the shape of the fast approaching white car and simply did his best to avoid it, unfortunately unsuccessfully. D1 did what he considered best to avoid an accident by steering over the road behind the white car. He reacted, perhaps wrongly, to a difficult situation but can't be blamed for that.

That this defence, as with "inevitable accident", is one which can only succeed in rare cases is shown by the lack of direct recent authority but the position is, I think, very accurately and succintly stated in *Bingham's Motor Claims Cases* 9th edn. 34.

"Where a person or a third party, is placed in danger by the wrongful act of the defendant, that person is not negligent if he exercises such care as may be reasonably expected of him in the difficult position which he is so placed. **He is not to blame if he does not do quite the right thing in the circumstances"**. (my emphasis) Reference is made to the decision of Swift J. in *Brandon v. Shorne and Garnett Co.* 1924 1 K.B. at 548.

I do not consider the defence of "agony of the moment" has been made out here. Dl was under a duty to see that he could safely move over into the inner lane. While a vehicle was already there and, may well, as a matter of courtesy, slow down to allow him to do so the driver is not under any obligation. D1

said he thought the white car may have speeded up after he first saw it, presumably to prevent him crossing over. That seems very unlikely given the high speed at which D1 says he was travelling. Counsel were unable to tell me what the speed limit is on the highway at the place where the accident happened but 85-100 kph seems to me to be very fast.

I am satisfied that on the evidence here D1, reacted to an emergency but it was one of his own making. The position is on all fours with that in *Hjh Hasmah Mohd. and Ors* where the learned Chief Justice also said "I do not think the 1st defendant was obliged to cross the main road. I must find (and his evidence was that this was a conscious decision and not a reaction to an emergency) that he had a choice and he made the wrong one". He found that the defendant driver 100% liable. The emergency here was the presence of the white car in the inner lane, coupled with D1's attempt to move into that lane. That attempt was of his own making. I am satisfied he was negligent and is 100% liable for the damage caused.

Third Party Proceedings

A third party notice was served on the 3rd party who however deny that they are under any liability to indemnify the defendants under the terms of the policy on the basis that the plaintiffs were at the time of the accident, acting in the course of their employment with D2.

There are two parts of the policy which are relevant. These read as follows:

Section II - Liability to Third Parties

1. The Company will subject to the Limits of Liability indemnify the insured in the event of accident caused by or arising out of the use of the motor vehicle against all sums including claimant's costs and expenses which the insured shall become legally liable to pay in respect of:

(a) Death of or bodily injury to any person except where such death or injury arises out of and in the course of employment of such persons by the insured and excluding liability to any person who at time of the occurrence of the event out of which any claim arises is a passenger in the motor vehicle or is entering or getting on to or alighting from the motor vehicle.

That seems very clear and is relied on by the 3rd party.

Later on in the policy, however, there is this article:

Passenger Liability Exclusion

Notwithstanding anything contained herein to the contrary it is hereby understood and agreed that the company shall not be liable in respect of death of or bodily injury to any person (other than a passenger being carried by reason of or in pursuance of a contract of employment) being carried in or upon, or entering in, or getting on or alighting from any vehicle in respect of which indemnity is granted under this policy at the time of the occurrence of the event out of which any claim arises.

I am quite satisfied here, and indeed there was really no argument mounted to the contrary by the defendants, that the plaintiffs, at the time of the accident, were acting in the course of their employment with D2. It is therefore the case for the 3rd party that section II - liability to third parties - covers the position and cl. 1(a) clearly and specifically excludes the plaintiffs from the cover. The 3rd party says that is logical as they would be covered by D2's workers compensation insurance and seems to be the intention of the legislation, (The motor vehicles insurance (third party risks) Act) Cap. 90 ("The Act"). It is the case for the defendants that I should simply have regard to the wording of this particular policy and the provisions and intention of the Act are not relevant. While art. II does exclude liability for employees and for passengers in the vehicle, the later section "passenger liability exclusion" by its wording does include in the cover passenger who were being carried by reason of or in pursuance of a contract of employment. Strong reliance is placed on the words in that later section "notwithstanding anything contained herein to the contrary".

It is the clear intention of the Act that employees should be covered by insurance in the event of injury. That may be an injury suffered in the course of the employment in which case the employee is covered by the workers compensation insurance or, much more rare but not unknown, the employee was not legally acting in the course of his employment but was doing something **in pursuance of his contract of employment** in which case he should be and here would be covered by the vehicle insurance.

The well-known decision in *St. Helens Colliery Co. Ltd. v. Hewitson* [1924] AC. 59 is a good illustration. There the plaintiff was injured while travelling to his place of employment on a train provided by his employers pursuant to an agreement with the train company. It was held that while the plaintiff was on the train pursuant to his contract of employment, he was not **obliged** to use the train but could have made his own travel arrangements, unlikely though that may have been. As Hewitson had the right to use the train but was not obliged to do so he was not acting "in the course of his employment". (It

seems to have remained unanswered how, apart from using the train, he was to get to the colliery at 5.45am to start his shift.)

Here, it is submitted by Mr Soo, it is clear that the plaintiffs were acting in the course of their employment and would be covered by D2's workers compensation policy but it is also then clear that by the intention of the Act and the wording of the policy they are not covered by the motor vehicle insurance. He relies on *Vandyke v. Fender* [1970] 2 All ER 335; per Lord Denning at 339-41. There it was held that the plaintiffs were riding in a car provided by the defendant pursuant to a contract of employment but, as they were not **obliged** to use the car, were not riding in it in the course of their employment. That had been decided in Hewitson. It was held that accordingly they should have been covered by a policy of insurance covering such passengers (section 203(4) of the Road Traffic Act 1960 (U.K.) and, in the absence of such a policy, the company nominated by the motor insurers bureau must meet the liability.

Reliance is also placed on the Brunei decision of the learned Chief Justice in *Lita Maddox (administratix of the Estate of Jaime Tipton Galdoves, (deceased) v. Netherlands Ins. Co. (Est. 1945) Ltd.* [1965-86] 2 BLR 433. There it was also held that the deceased person was, at the time of the accident in which he was killed, travelling "by reason of his contract of employment" but not "in the course of his employment".

The terms of the policy being considered in Maddox were as follows:

> **Section 11 - Liability to Third Parties**
>
> The Company will subject to the limits of liability indemnify the insured in the event of accident caused by or arising out of the use of the motor vehicle or in connection with the loading or unloading of the motor vehicle against all sums including claimant's costs and expenses which the insured shall become legally liable to pay in respect of -
>
> (a) death of or bodily injury to any person;
>
> (b) damage to property.
>
> Exceptions to Section II
>
> The Company shall not be liable in respect of ...
>
> (ii) death of or bodily injury to any person in the employment of the insured arising out of and in the course of such employment;

(iii) death of or bodily injury to any person (other than a passenger carried by reason of or in pursuance of a contract of employment) being carried in or upon entering or getting on to or alighting from the motor vehicle at the time of the occurrence of the event out of which any claim arises.

These terms are very similar but not identical to the ones I have to consider here. It was held by Roberts C.J. that the insurers were liable. He was satisfied that the deceased was not being carried in the vehicle in the course of his employment so exception (ii) did not apply but while not obliged to use the employer's transport he was entitled to use it and it was open to the court to find, which it did, that he was being carried "by reason of or in pursuance of that employment" and exception (iii) also did not apply. The insurer was accordingly liable under the general cover provided.

Here, however, Mr Soo says that as the plaintiffs were acting "in the course of their employment", the exclusion clause is clearly relevant and the plaintiffs are not covered.

The decision is relied on as support for the proposition that if a person is killed or injured but was not acting in the course of his employment he can't be brought into the exception which seems to cover the wider category of persons acting "by reason of or in pursuance of a contract of employment" except in very rare cases, as stated by Lord Wright in *Izzard v. Universal Iron Co. Ltd.* [1937] AC 773, of a person acting by reason of his employment with **another** employer, such as the owner of goods carried on a lorry.

Mr Soo argues that if the plaintiffs were being carried in the course of their employment they come within the first exception and that is an end to the matter. The policy must be considered as a whole. He says that is "settled law" but does not cite authority for that proposition.

For the defendants Mr Sankaran submits that I should simply look at the words of the policy which forms the contract between D2 and the 3rd party. There is no need or reason to consider the legislation which is the background to it. There are two clauses to consider. The first exempts from cover a person being carried "in the course of their employment" and also all passengers. However the second clause states that a person being carried "by reason of his employment" shall be covered. There is a conflict between them but reliance is placed on the words in the second clause of the policy - and it is the 3rd party's own policy - "notwithstanding anything contained herein to the contrary". Those words, which were not in any of the policies being considered in other cases such as Maddox, must be given their ordinary meaning which is clear. The "passenger liability exclusion clause" does include passengers being carried by reason of employment and it specifically says that

anything to the contrary *ie*, the clause "liability to third parties" 1(a) which says there is no cover for persons being carried in the course of their employment must be ignored. Whatever the intention of the legislation is, and even if the result is illogical, that is what the policy clearly says. The plaintiffs do not even have to rely on the contra proferentem rule which would, if there was doubt, be in their favour.

Decision

The question here is one which, as far as I can see, has never arisen directly before. The previous questions posed have been whether the plaintiffs were acting in the course of their employment (*St. Helens Colliery v Hewitson, Weaver v Tredegar Iron and Coal Co. Ltd.*) [1940] 3 All ER 157, *Vandyke v. Fender and Anor*, if not was "by reason of or in pursuance of a contract of employment" (*Izzard v. Universal Iron Co. Ltd., Lita Maddox v. Netherlands Ins. Co. Ltd.*).

In Izzard Lord Wright said this at 779-80:

> That section provides that the company will indemnify the insured against liability (*inter alia*) in respect of death or bodily injury to any person caused by or arising out of the use of the vehicle, including the loading and unloading of it. This indemnity is subject to certain exceptions or provisos, of which it is here necessary to particularize two:
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> (b) Death of or bodily injury to any person in the employment of the insured arising out of and in the course of such employment; (c) death of or bodily injury to any person (other than a passenger carried by reason of or in pursuance of a contract of employment) being carried in or upon or entering or getting on to or alighting from such vehicle at the time of the occurrence of the event out of which any claim arises.
>
> It is clear that though passenger risk in the full sense of the term is excluded, a certain limited class of passenger risk is specifically covered - namely, that described in the words in brackets in (c) quoted above **which is in the form of an exception to an exception. and thus constitutes a positive cover**. The crucial question is whether these words cover the particular liability which is claimed to exist in this case.
>
> It will be convenient before seeking to answer the question to dispose of certain difficulties which have been raised. It was contended on behalf of the respondents that the express negation of passenger risk on the face of the proposal made it impossible to bring in the limited passenger risk specified in (c) quoted above. **I think there are at least two sufficient answers to this objection. The first is that though the warranties and conditions expressed in the proposal are declared to be basic conditions of the policy, that must be subject to their being overridden by any express terms to the contrary**

> **effect in the actual policy.** No doubt the proposal conditions and the express conditions of the policy must be part of the contract may receive effect. But if there is a final and direct inconsistency, **the positive and express terms of the policy must prevail**. If the proposal by itself is read as negativing absolutely any cover of passenger risk, **the policy which incorporates the proposal must be construed as limiting that generality to the extent expressly provided by (c) which must *pro tanto* prevail**. (My emphasis)

Lord Wright goes on to consider his other answer which is not relevant here.

The decision in Izzard clearly worried the learned Chief Justice when considering Maddox. While he held that the deceased was not acting "in the course of his employment" he was "by reason of his employment". He said:

> Care must be taken not to interpret exception (iii) in such a manner as to nullify exception (ii). If the insurer is not liable because the deceased was acting in the course of his employment, a narrow meaning must be given to the phrase "by reason of or in pursuance of a contract of employment", since, in the widest sense, the latter phrase would comprehend the former.
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> Thus the exception to exception (iii) should, in my view, be given a restricted meaning, so that, if a person is killed, when not acting in the course of his employment, it will be very rare, as Lord Wright observes, for him to be found to have been killed by reason of or in pursuance of a contract of employment.
>
> I can reconcile these cases only on the basis that if the deceased was obliged by his contract of employment to travel in the vehicle in which he was killed, on his way to work, he is acting in the course of his employment. But if he was entitled to or eligible to make use of that vehicle, in which he is travelling as a passenger when killed, it is open to the court to find that he was so travelling by reason of his contract of employment, even though not in the course of his employment.
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> I reach this conclusion with some difficulty, in view of Izzard, though I note that Lord Wright noted that, in some circumstances, an employee of the assured might be able to claim as passenger.

It would seem from this that the learned Chief Justice was not limiting the words "by reason of or in pursuance of a contract of employment" to those persons who are killed or injured as passengers in a vehicle while acting by reason of their employment with some other employer than the owner of the vehicle, which was suggested as a possibility by Lord Wright.

It seems to me that if the 3rd party meant those words to be given that very narrow meaning it could have been easily so stated in the policy. It was not.

I agree with what has been submitted by Mr Sankaran for D2 that: I must simply consider the wording of this particular policy and give those words their natural meaning. That being so I consider that the only way I could find

that the plaintiffs, being passengers carried in the van by reason of or in pursuance of a contract of employment were not covered by the second article of the policy, would be to add words to that article to make it read ('other than a passenger being carried by reason of or in pursuance of a contract for employment with an employer other than the insured") I do not think I can or should do so. I am satisfied that Mr Sankaran is correct in that the words "notwithstanding anything contained herein to the contrary" must be given the ordinary meaning which is that persons being carried who are doing so by reason of or in pursuance of a contract of employment includes a contract of employment with the insured and such persons are, by the wording of this particular policy, covered by it.

For these reasons I am satisfied that the 3rd party is liable to indemnify D2 against the plaintiffs' claim.

I will hear the parties as to consequential orders and costs.